

**FINANCIAL INDUSTRY REGULATORY AUTHORITY
OFFICE OF HEARING OFFICERS**

DEPARTMENT OF ENFORCEMENT,

Complainant,

v.

ERNESTO ZUNIGA GOMEZ
(CRD No. 4713558)

Respondent.

Disciplinary Proceeding
No. 2008015692801

Hearing Officer – MAD

DEFAULT DECISION

March 2, 2011

Respondent is barred from associating with any member firm in any capacity for (1) improperly using customer funds, in violation of Conduct Rules 2330(a) and 2110; (2) falsifying firm records, in violation of Conduct Rule 2110; and (3) failing to respond to FINRA information requests, in violation of Procedural Rule 8210 and Conduct Rules 2110 and 2010.

Appearances

Leo J. Kane, Senior Counsel, and Paul M. Schindler, Director, Washington, D.C., for the Department of Enforcement.

No appearance by or on behalf of Ernesto Zuniga Gomez.

DECISION

I. Introduction

The FINRA Department of Enforcement ("Enforcement") filed the attached Complaint with the Office of Hearing Officers on October 20, 2010. The Complaint charges Respondent Ernesto Zuniga Gomez ("Gomez"), a former registered representative with Merrill Lynch, Pierce, Fenner & Smith ("Merrill"), with (1) improper use of customer funds, in violation of Conduct Rules 2330(a) and 2110, (2) falsification of firm records, in violation of Conduct Rule

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2110, and (3) failure to respond to FINRA information requests, in violation of Procedural Rule 8210 and Conduct Rules 2110 and 2010.¹

Gomez defaulted by failing to answer or otherwise respond to the Complaint. On January 13, 2011, Enforcement filed a Motion for Entry of Default Decision with the Office of Hearing Officers, together with the Declaration of Paul M. Schindler ("Schindler Decl.") and four exhibits. Gomez did not respond to the motion.

Based on the facts alleged in the Complaint, which are deemed admitted pursuant to Rules 9215(f) and 9269(a), as well as the additional evidence Enforcement filed in support of its motion for entry of default decision, the Hearing Officer barred Gomez from associating with any member firm in any capacity for the violation.

II. Background

Gomez first entered the securities industry in July 2003.² From November 2003 until November 2008, Gomez was registered with FINRA as a General Securities Representative.³ On November 13, 2008, Merrill filed a Uniform Termination Notice for Securities Industry Registration ("Form U5") on Gomez's behalf.⁴ The Form U5 disclosed that Merrill discharged Gomez for transferring clients' funds between clients' accounts without their authorization.⁵

¹ As of July 30, 2007, NASD consolidated with the member regulation and enforcement functions of NYSE Regulation and began operating under a new corporate name, the Financial Industry Regulatory Authority (FINRA). References in this decision to FINRA include, where appropriate, NASD. Following consolidation, FINRA began developing a new FINRA Consolidated Rulebook. The first phase of the new consolidated rules became effective on December 15, 2008, including certain conduct rules and procedural rules. *See* Regulatory Notice 08-57 (Oct. 2008). This decision refers to and relies on the conduct rules that were in effect at the time of Respondent's misconduct. Conduct Rule 2110 was renumbered as Rule 2010 in the Consolidated Rulebook without substantive change. The applicable rules are available at www.finra.org/rules.

² Schindler Decl. ¶ 4; CX-1, at 3.

³ Schindler Decl. ¶ 5; CX-1, at 3, 5.

⁴ Schindler Decl. ¶ 5; CX-2.

⁵ Schindler Decl. ¶ 5; CX-2, at 2.

III. Jurisdiction

FINRA has jurisdiction over this disciplinary proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the termination of his registration with FINRA, and (2) the Complaint charges him with misconduct that occurred while he was registered with a FINRA member firm.⁶

IV. Gomez's Default

On October 20, 2010, Enforcement served Gomez with the Notice of Complaint and Complaint by certified mail (return receipt requested) sent to his residential address recorded in the Central Registration Depository ("CRD").⁷ The United States Postal Service ("USPS") on-line delivery confirmation service indicated that the USPS left a notice at Gomez's CRD address on October 23, 2010.⁸

On November 23, 2010, Enforcement served Gomez with the Second Notice of Complaint and Complaint by certified mail (return receipt requested) sent to his CRD address.⁹ The USPS returned the certified return receipt to Enforcement, dated November 26, 2010, and signed by "Fred Jamil."¹⁰ To date, Gomez has not responded to the Complaint.

⁶ See Article V, Sec. 4(a), FINRA By-Laws, available at www.finra.org/Rules (then follow "FINRA Manual" hyperlink to "Corporate Organization: By-Laws").

⁷ Schindler Decl. ¶ 7; CX-4.

⁸ Schindler Decl. ¶ 7, CX-4, at 14.

⁹ Schindler Decl. ¶ 8; CX-3.

¹⁰ Schindler Decl. ¶ 8; CX-3, at 15.

The Hearing Officer finds that Gomez received constructive notice of this proceeding.¹¹ Accordingly, the Hearing Officer finds that Gomez defaulted by failing to answer or otherwise respond to the Complaint.

V. Findings of Fact and Conclusions of Law

A. Improper Use of Customer Funds

The First Cause of the Complaint alleges that, on three separate occasions, Gomez transferred funds between the accounts of his different customers without their authorization. For fund transfers under \$50,000, Merrill did not require a letter of authorization. Instead, a manger could approve the transfer based upon a verbal authorization form ("VAF") in which the registered representative confirmed that he had personally spoken to the customer and verified that the customer had authorized the fund transfer.¹²

Between May and July 2008, Gomez created VAFs to authorize transfers of funds between the accounts of different customers.¹³ On May 15, 2008, Gomez created a VAF that falsely represented that Customer A had given him authorization to transfer \$37,000 from Customer A's account to Customer B's account, and that the funds were a "personal loan" to Customer B.¹⁴ Gomez's managers approved the VAF and the funds were transferred on May 15, 2008.¹⁵ Customer A neither authorized the transfer nor agreed to make a personal loan to

¹¹ *Department of Enforcement v. Reynolds Verdiner*, No. CAF020004, 2003 NASD Discip. LEXIS 42, at *5 n.1 (N.A.C. Dec. 9, 2003) (Procedural Rule 9134(b)(1) allows for constructive notice by mailing a complaint to the respondent's most recent CRD address) (quoting *Lubeck v. SEC*, 1998 U.S. App. LEXIS 18849, at *20 (9th Cir. Aug. 12, 1998)).

¹² Schindler Decl. ¶ 12.

¹³ *Id.* ¶ 13.

¹⁴ *Id.* ¶ 14.

¹⁵ *Id.* ¶ 15.

Customer B.¹⁶ When Customer A complained to Merrill about the unauthorized transfer, Merrill returned the \$37,000 to Customer A's account.¹⁷

On June 24, 2008, Gomez created a false VAF, representing that Customer B had given him verbal authorization to transfer \$7,957 from Customer B's account to Customer A's account.¹⁸ The VAF stated that Customer B was transferring the funds to her "business partner" to "pay off a personal loan" from Customer A.¹⁹ Again, Gomez's managers approved the VAF and the funds were transferred.²⁰ Customer B never authorized this transfer of funds or needed to pay off a personal loan from Customer A.²¹ When Customer B complained to Merrill, it returned the \$7,957 to her account.²²

On July 7, 2008, Gomez created a VAF that falsely represented that Customer C had authorized a \$43,000 transfer from his account to Customer B's account.²³ The VAF stated that Customer C was transferring the funds to "lend money to a business partner for the purchase of real estate."²⁴ That same day, Gomez's managers approved the transfer and the funds were transferred to Customer B's account.²⁵ Customer C never authorized this transfer, or agreed to

¹⁶ *Id.* ¶ 16.

¹⁷ *Id.* ¶ 17.

¹⁸ *Id.* ¶ 18.

¹⁹ *Id.*

²⁰ *Id.* ¶ 19.

²¹ *Id.* ¶ 20.

²² *Id.* ¶ 21.

²³ *Id.* ¶ 22.

²⁴ *Id.*

²⁵ *Id.* ¶ 23.

lend money to Customer B.²⁶ When Customer C complained to Merrill about the unauthorized transfer, Merrill returned the funds to him.²⁷

Gomez told his supervisors at Merrill that Customer B's account had experienced a margin call on July 7, 2008, and that he had transferred funds from Customer C's account to help Customer B meet the margin call.²⁸ Gomez admitted that he had not consulted with either customer, and that he had exercised poor judgment.²⁹ Gomez also admitted that he had told Customer C that the funds had been transferred because of an error and not because of a purported loan for the purchase of real estate.³⁰

Gomez arranged for the unauthorized transfers of funds between his customers' accounts on May 15, June 24, and July 7, 2008. The Hearing Officer finds that Gomez improperly used customer funds in violation of Conduct Rules 2330(a) and 2110.

B. Falsification of Firm Records

The VAFs that Gomez created contained false representations as to why the funds were being transferred between the accounts of his customers. These false VAFs were part of Merrill's records. Accordingly, the Hearing Officer finds that Gomez falsified firm records, in violation of Conduct Rule 2110.

C. Failure to Respond to FINRA Information Requests

Pursuant to Procedural Rule 8210, FINRA staff sent four written requests for information to Gomez on December 11, 2008, June 5, 2009, August 7, 2009, and January 4, 2010.³¹ Each

²⁶ *Id.* ¶ 24.

²⁷ *Id.* ¶ 26.

²⁸ *Id.* ¶ 27.

²⁹ *Id.*

³⁰ *Id.* ¶ 28.

³¹ *Id.* ¶¶ 36-39.

letter was sent by certified mail (return receipt requested) to Gomez's CRD address and signed for by "Fred Jamil."³² Gomez failed to respond to all of the request letters.³³ The Hearing Officer finds that, by failing to respond to the request letters, Gomez violated Procedural Rule 8210 and Conduct Rules 2110 and 2010.

VI. Sanctions

A. Improper Use of Customer Funds

For improper use of customer funds, the FINRA's Sanction Guidelines ("Guidelines") recommend a fine ranging from \$2,500 to \$50,000, and consideration of a bar.³⁴ Here, Gomez transferred funds out of his customers' accounts without their knowledge or authorization. Gomez has shown by his conduct that he would pose a substantial risk to the investing public if he were allowed to associate with a member firm in the future. Accordingly, the Hearing Officer concludes that the appropriate sanction for this violation is a bar.³⁵

B. Falsification of Firm Records

For forgery and falsification of records, the Guidelines recommend a fine of \$5,000 to \$100,000, and a suspension in any or all capacities for up to two years in cases where mitigating factors exist. In egregious cases, the Guidelines recommend a bar.³⁶ The Guidelines instruct adjudicators to consider, in addition to the principal considerations and general principles

³² *Id.* ¶¶ 36-40.

³³ *Id.* ¶¶ 36-39, 41.

³⁴ If mitigating circumstances are present, such as when the misuse may be attributable from a respondent's misunderstanding of the customer's intended use of the funds, the Sanction Guidelines recommend a suspension of six months to two years, or until the respondent pays restitution. *FINRA Sanction Guidelines* 36 (2010). No such mitigating circumstances are present in this case.

³⁵ *Cf. In re Lawrence R. Klein*, 52 S.E.C. 535, 536-37 (1995) (determining that a bar was appropriate even though respondent did not personally profit from the misappropriated funds).

³⁶ *FINRA Sanction Guidelines* 37 (2010), available at www.finra.org/sanctionguidelines.

applicable to all violations, the nature of the falsified document and whether respondent had a good faith, but mistaken, belief of express or implied authority.³⁷

Applying the applicable Guidelines, the Hearing Officer finds that Gomez's violation was egregious. Gomez admitted to Merrill that he falsified the records without his customers' knowledge or consent. The transfers involved significant sums of money. Based on these aggravating factors, and the lack of any mitigating factors, the Hearing Officer concludes that the appropriate sanction for this violation is a bar.

C. Failure to Respond to FINRA Information Requests

The Guidelines recommend a bar when a respondent fails to respond in any manner to a request for information issued pursuant to Procedural Rule 8210.³⁸ Here, Gomez failed to respond in any manner to four written requests FINRA staff issued in connection with its investigation into his unauthorized transfers of funds at Merrill. There are no mitigating factors. Accordingly, the Hearing Officer concludes that the appropriate sanction for this violation is a bar.

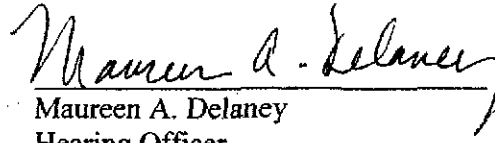
VII. Order

Ernesto Zuniga Gomez is barred from associating with any member firm in any capacity for: (1) improper use of customer funds, in violation of Conduct Rules 2330(a) and 2110; (2) falsification of firm records, in violation of Conduct Rule 2110; and (3) failure to respond to FINRA information requests, in violation of Procedural Rule 8210 and Conduct Rules 2110 and

³⁷ *Id.*

³⁸ *Id.* at 33.

2010, as alleged in the Complaint. The bars shall become effective immediately if this Default Decision becomes the final disciplinary action of FINRA.


Maureen A. Delaney
Hearing Officer

Copies to:

Ernest Zuniga Gomez (*via overnight courier and first class mail*)
Leo J. Kane, Esq. (*via electronic and first class mail*)
Paul M. Schindler, Esq. (*via electronic and first class mail*)
David R. Sonnenberg, Esq. (*via electronic mail*)

FINANCIAL INDUSTRY REGULATORY AUTHORITY

OFFICE OF HEARING OFFICERS

Department of Enforcement,

Complainant,

v.

Ernesto Zuniga Gomez
(CRD No. 4713558),

Respondent.

OCT 20 2010

DISCIPLINARY PROCEEDING
No. 2008015692801

COMPLAINT

The Department of Enforcement alleges:

SUMMARY

1. Respondent Ernesto Zuniga Gomez ("Zuniga") misused customer funds, falsified firm records, and failed to comply with requests for information from FINRA. On three separate occasions, Zuniga transferred funds between the accounts of his different customers without their authorization. He secured supervisory approval of these unauthorized fund transfers by creating Verbal Authorization Forms which contained false and misleading explanations to justify the transfers. Moreover, Zuniga failed to comply with four requests for information from FINRA staff. Accordingly, Zuniga violated NASD Rules 2330(a) and 2110, FINRA and NASD Rules 8210, and FINRA Rule 2010.

RESPONDENT AND JURISDICTION

2. Zuniga entered the securities industry in July 2003 with Merrill Lynch, Pierce,

Fenner & Smith ("Merrill") in San Diego, California. While associated with Merrill, Zuniga maintained the following registrations:

- a. General Securities Representative (Series 7); and
 - b. Uniform Combined State Law and Registered Investment Advisor (Series 66).
3. Merrill terminated Zuniga on November 3, 2008.
 4. On November 13, 2008, Merrill filed a Form U-5 disclosing for the first time that Zuniga had engaged in the conduct described below.
 5. Although Zuniga has not been associated with a FINRA member firm since his termination by Merrill, he remains subject to FINRA's jurisdiction for purposes of this proceeding, pursuant to Article V, Section 4 of FINRA's By-Laws, because (1) the Complaint was filed within two years after the date upon which he ceased to be associated with a FINRA member, and (2) the Complaint charges Zuniga with misconduct committed while he was associated with a FINRA member and with failing to respond to NASD and FINRA requests for information during the two-year period after the date upon which he ceased to be associated with a member.

**FIRST CAUSE OF ACTION
Improper Use of Customer Funds
(NASD Rules 2330(a) and 2110)**

6. The Department realleges and incorporates by reference paragraphs 1-5 above.
7. For fund transfers of under \$50,000, Merrill did not require its registered representatives to secure a Letter of Authorization signed by the customer. Instead, the transfer could be approved by a manager based upon a Verbal Authorization Form ("VAF") in which the registered representative confirmed that he/she had personally spoken with the customer and verified that the customer had authorized the fund transfer.

8. Zuniga created VAFs on May 15, 2008, June 24, 2008 and July 7, 2008 to authorize transfers of funds between the accounts of different customers. Each of these VAFs contained false explanations as to the reasons for the fund transfers.

May 15, 2008 Transfer of \$37,000 from Client A to Client B

9. On May 15, 2008, Zuniga created a VAF that falsely represented that Client A had given him verbal authorization to transfer \$37,000 from Client A's account to Client B's account, and that the funds were a "personal loan" to Client B.

10. The VAF was approved by Zuniga's managers and the funds were transferred on May 15, 2008.

11. Client A had not authorized this transfer of funds. Client A had not agreed or intended to make a personal loan to Client B, either at this time or any other time.

12. When Client A later complained to Merrill about the unauthorized fund transfer, Merrill credited the \$37,000 back to Customer A's account, with interest.

June 24, 2008 Transfer of \$7,957 from Client B to Client A

13. On June 24, 2008, Zuniga created a VAF that falsely represented that Client B had given him verbal authorization to transfer \$7,957 from Client B's account back to Client A's account. The VAF indicated that Client B was enacting the transfer in order to transfer funds to her "business partner" in order to "pay off a personal loan" she had purportedly received from Client A.

14. The VAF was approved by Zuniga's managers and the funds were transferred on June 24, 2008.

15. Client B had not authorized this transfer of funds, borrowed funds from Client A,

or faced any need to pay off a personal loan from Client A. Moreover, Client B had no business dealings with Client A that involved their Merrill accounts or personal loans to one another.

16. When Client B later complained to Merrill about this unauthorized transfer of funds from her account, Merrill credited the \$7,957 back to her account.

July 7, 2008 Transfer of \$43,000 from Client C to Client B

17. On July 7, 2008, Zuniga created a VAF that falsely represented that Client C had given him verbal authorization to transfer \$43,000 from Client C's account to Client B's account. The VAF indicated that Client C was enacting the transfer in order to "lend money to a business partner for the purchase of real estate."

18. The VAF was approved by Zuniga's managers and the funds were transferred on July 7, 2008.

19. Client C had not authorized this transfer of funds, and he had not agreed or intended to lend money to Client B.

20. Client B (the recipient of the funds) was not a business partner of Client C; was not purchasing real estate; was not borrowing money from Client C, and had no advanced knowledge of this fund transfer.

21. When Client C later complained to Merrill about the unauthorized fund transfer, Merrill credited the \$43,000 back to Customer C's account, with interest.

22. Zuniga told his supervisors at Merrill that Client B's account had faced a margin call on July 7, 2008, that he had transferred the funds from Client C's account to help Client B meet the margin call, that he had not consulted with, or received the consent of, either client in advance of the fund transfer; and that he had exercised poor judgment.

23. Zuniga also admitted to his supervisors that he had told Client C that the funds had been transferred because of an error and not because of a purported loan for the purchase of real estate.

24. In arranging for the unauthorized transfers of funds between his customers' accounts on May 15, 2008, June 24, 2008 and July 7, 2008, Zuniga was improperly using customer funds in violation of NASD Rules 2330(a) and 2110.

**SECOND CAUSE OF ACTION
Falsification of Firm Records
(NASD Rule 2110)**

25. The Department realleges and incorporates by reference paragraphs 1-24 above.

26. The VAFs that Zuniga created on May 15, 2008, June 24, 2008 and July 7, 2008 contained false representations as to why the funds were being transferred between the accounts of his customers.

27. These false VAFs became part of Merrill's records.

28. By including false and misleading information on three VAFs, Zuniga violated NASD Rule 2110.

**THIRD CAUSE OF ACTION
Failure to Respond to Requests for Information
(NASD and FINRA Rule 8210, NASD Rule 2110 and FINRA Rule 2010)**

29. The Department realleges and incorporates by reference paragraphs 1-28 above.

30. On December 11, 2008, FINRA staff sent a written request to Zuniga seeking information and documents pursuant to NASD Rule 8210. The letter was sent by certified mail to the address listed for Zuniga in Web CRD ("the CRD address"). Zuniga failed to respond by the requested deadline.

31. On June 5, 2009, FINRA staff sent a written request to Zuniga seeking information and documents pursuant to FINRA Rule 8210. The letter was sent by certified mail to the CRD address. Zuniga failed to respond by the requested deadline.

32. On August 7, 2009, FINRA staff sent a written request to Zuniga seeking information and documents pursuant to FINRA Rule 8210. The letter was sent by certified mail to the CRD address and enclosed a copy of the previous request letter dated June 5, 2009. Zuniga failed to respond by the requested deadline.

33. On January 4, 2010, FINRA staff sent a written request to Zuniga seeking information and documents pursuant to FINRA Rule 8210. The letter was sent by certified mail to the CRD address and enclosed a copy of each of the previous request letters. Zuniga failed to respond by the requested deadline.

34. Each of the four request letters discussed above was delivered to Zuniga's CRD address and signed for by F.J.

35. In failing to respond to the request letter dated December 11, 2008, Zuniga violated NASD Rules 8210 and 2110. In failing to respond to the request letters dated June 5, 2009, August 7, 2009, and January 4, 2010, Zuniga violated FINRA Rules 8210 and 2010.

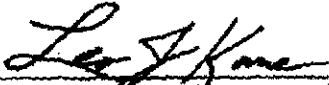
RELIEF REQUESTED

WHEREFORE, the Department respectfully requests that the Panel:

- A. order that one or more of the sanctions provided under FINRA Rule 8310(a), including monetary sanctions, be imposed; and
- B. order that the Respondent bear such costs of proceeding as are deemed fair and appropriate under the circumstances in accordance with FINRA Rule 8330.

FINRA DEPARTMENT OF ENFORCEMENT

Date: 10/20/2010


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